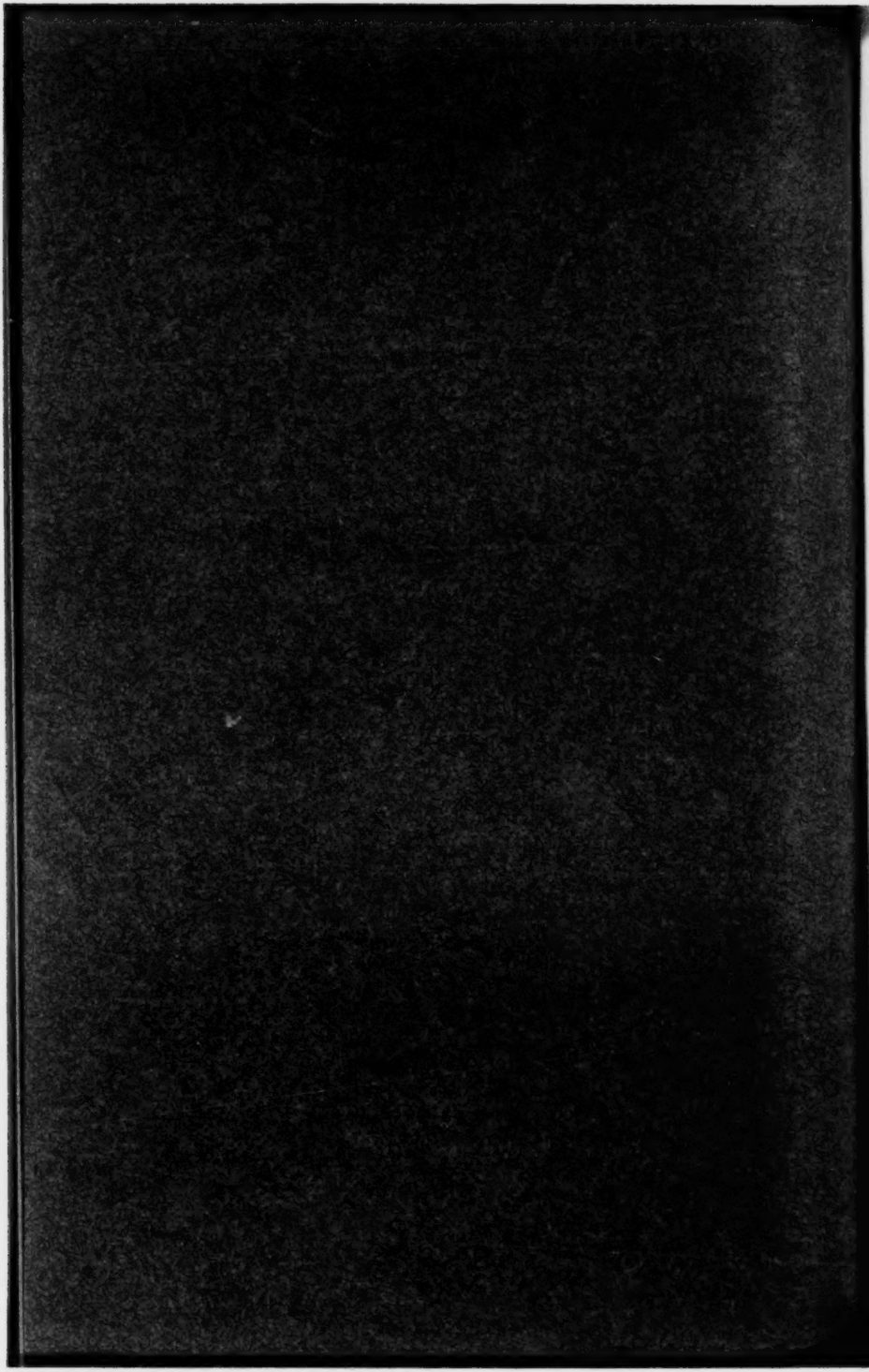

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 727

FREDERICK K. BARBOUR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority (R. 149–157) and concurring (R. 157–158) opinions of the Board of Tax Appeals are reported at 39 B. T. A. 910. The opinion of the Circuit Court of Appeals (R. 177–181) is reported at 122 F. (2d) 165.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 12, 1941 (R. 181–182). The petition for a writ of certiorari was filed Novem-

ber 4, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the income from short-term trusts is taxable to the grantor under Section 22 (a) of the Revenue Act of 1934 where payable to members of the grantor's family, and where, upon termination of the trusts, the corpus would revert to the grantor, if living, and, if not, to his appointees or his children or their heirs, control of the trusts during their terms being vested in the trustees, who were the grantor's lawyers.

2. Whether the Circuit Court of Appeals, instead of holding the grantor taxable under Section 22 (a), should have remanded the case for rehearing before the Board of Tax Appeals, where the applicability of Section 22 (a) had been urged by the Commissioner for the first time before the court, but where the taxpayer expressed no desire for a rehearing and alleged no additional facts which, if proved, would render the section inapplicable.

STATUTE INVOLVED

Revenue Act of 1934, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in

> whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (U. S. C., Title 26, Sec. 22.)

STATEMENT

The material facts are undisputed and may be stated as follows:

Petitioner, on October 29, 1931, executed a deed of trust (R. 33–48) whereby he transferred large amounts of corporate stock to his lawyers (R. 180; Pet. 4, 9, 10) as trustees, subject to a loan for which the trust estate was held by a bank as collateral (R. 38). The trustees were given full control over the corpus of the trust, were authorized to assume payment of the loan, and were directed, after paying interest on the loan, to pay the net income in monthly or quarterly installments as follows: four-tenths to petitioner's wife, one-tenth to each of their three minor children, and three-tenths to the mother of petitioner's wife. No power to revoke or change the terms of the trust, or exercise any control over the trust property or its management, was reserved by petitioner. The instrument provided that if any

beneficiary, other than petitioner's wife, should die, the income payable to such deceased beneficiary would become payable to the wife. The trust was to terminate upon the death of either the grantor or his wife, or upon her attaining the age of thirty-four years, eleven months, and twelve days, which would occur on December 31, 1932. Upon termination the trust estate was to be returned to the grantor absolutely, or, if the termination should have occurred because of the death of the grantor, the trust estate was to be delivered to the persons designated in the grantor's will, or in default of will, to his surviving children or their heirs (R. 34–45, 150–151). By successive instruments made March 11, 1932 (R. 51–52) and December 15, 1934 (R. 53–56), the trust was extended to December 31, 1940, provided that it was not terminated earlier by reason of the death of either the grantor or his wife (R. 151).

On November 20, 1934, petitioner executed a second deed of trust (R. 57–71), with the same trustees, for the same beneficiaries, and upon terms in all essentials similar to those set out in the first trust, except that the trust, unless terminated by the death of the grantor or his wife, was to terminate when she attained an age seven years older than that specified in the first trust, which would occur on December 31, 1939. The corpus of this trust was increased by petitioner on December 15, 1934, by an assignment to the trustees of addi-

tional securities (R. 76–80). By separate agreement (R. 72–75), also dated December 15, 1934, the term of the trust was extended one year to December 31, 1940, provided it was not terminated prior thereto by the death of either the grantor or his wife (R. 151).

The trustees administered the trusts according to their provisions and paid the income to the beneficiaries. None of the income from either trust for the years 1934 and 1935 was paid to petitioner and none of it was reported by him in his income tax returns for those years (R. 151, 152). The Commissioner determined that the income from the trusts was taxable to petitioner under Section 166 of the Revenue Act of 1934 and asserted deficiencies for the years mentioned (R. 11–23). The Board of Tax Appeals decided that the trust income was not taxable as contended by the Commissioner (R. 149–152).

On review in the court below the Commissioner, in view of the supervening decisions of this Court in *Helvering* v. *Clifford,* 309 U. S. 331, and *Helvering* v. *Wood,* 309 U. S. 344, abandoned his reliance upon Section 166 and contended that the income from the trusts was taxable to petitioner under Section 22 (a) within the rule of the *Clifford* case.[1] The court sustained this contention,

[1] The Commissioner further claimed, in the alternative, that, even if the entire income of the two trusts was not taxable to the grantor, the $5,208 of trust income, which in 1935

reversed the order of the Board, and remanded the proceedings with instructions to compute petitioner's taxable income and determine the deficiency in accordance with the court's opinion (R. 177–182).

ARGUMENT

The court below correctly held that the case is governed by the decision in the *Clifford* case since, as it pointed out, there is here "the same retention by the taxpayer of the reversion, and the same 'temporary reallocation of income within an intimate family group' " (R. 180). Neither of the trusts by its original terms or during any period of extension had a life longer than 6 years and 16 days (R. 178–179).

1. While the trusts in the *Clifford* case and in *Hormel* v. *Helvering,* 312 U. S. 552 contained provisions under which the settlors could continue to control the trust property, the opinions of the Court do not state or imply that the existence of such provisions is a prerequisite to the application of Section 22 (a), and in the instant circumstances it would be unreasonable to hold the absence of such provisions determinative. Hence

---

was applied to the payment of a premium on a policy of insurance on the grantor's life, was taxable to the grantor under Section 167 (a) (3) of the Revenue Act of 1934. The Board decided that question also against the Commissioner (R. 152–157). The court below, in view of its decision as to the taxability of the entire trust income, did not pass upon this alternative point (R. 179).

the conflict alleged by petitioner (Pet. 8) is without basis.

In the *Clifford* case the Court expressly declared (309 U. S. at 336) that "no one fact is normally decisive" of the question of ownership for purposes of Section 22 (a). The settlor's retention or surrender of control of the property is of course a relevant consideration, but the court below properly has taken the view in this and similar cases[2] that the absence of provisions reserving control is of comparatively little significance where the duration of the trust is not substantially longer than the five-year period involved in the *Clifford* case. See *Harrison* v. *Schaffner,* 312 U. S. 579, 583. If petitioner intended to relinquish all practical control and ownership, it seems probable that he would have provided originally for a longer duration of the trusts instead of making, in effect, a succession of short-term trusts. The fact that the trustees were his lawyers who would normally observe his wishes in managing the estate is an additional circumstance properly considered by the court below (R. 180).

2. Petitioner urges (Pet. 5, 12) that even if the court below was correct in holding him taxable on

[2] *Helvering* v. *Elias*, 122 F. (2d) 171, petition for a writ of certiorari pending, No. 728, this Term; *Commissioner* v. *Woolley*, 122 F. (2d) 167; *Richardson* v. *Commissioner*, 121 F. (2d) 1; *Commissioner* v. *Buck*, 120 F. (2d) 775, 778. Cf. *Commissioner* v. *Jonas*, 122 F. (2d) 169.

the seven-tenths of the trust income received by his wife and children, it erred in including the remaining three-tenths which was paid to his mother-in-law since there is no evidence that she was dependent upon him and since the court found that she did not live in his household or town. Whether or not she was a member of the "intimate family group," however, as thought by the court below (R. 181), it seems clear that petitioner simply employed the trust device to deflect his income to her and must be charged therewith just as though he had received it directly and paid it over to her; in either situation he would enjoy the same satisfaction, and the tax consequences would be the same. *Helvering* v. *Horst,* 311 U. S. 112, 117; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579.

3. Petitioner contends (Pet. 8, 13–14) finally that the court below erred in not remanding the case to the Board for rehearing on the question of the applicability of Section 22 (a) under the *Clifford* rule and that its decision in that regard is contrary to *Hormel* v. *Helvering,* 312 U. S. 552 and *Helvering* v. *Richter,* 312 U. S. 561. In his brief (p. 15) in the court below the Commissioner conceded that under the decision in the *Hormel* case "if the taxpayer so desires, he should be given an opportunity to present evidence on this issue before the Board." (See Pet. 13.) But petitioner in his answering brief expressed no such

desire to the court and even now does not claim the existence of any additional facts, including any concerning the taxability of the income payable to his mother-in-law, which he desires to prove or which, if established, would show that Section 22 (a) is inapplicable. Accordingly, if the court below erred at all, which we submit it did not, the error presumably was harmless and constitutes no reason for review. Cf. *White* v. *Higgins,* 116 F. (2d) 312, 321 (C. C. A. 1).

CONCLUSION

The decision below correctly follows the controlling decisions of this Court. The case involves the application of established principles to the particular facts and presents no question calling for review. There is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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